91-1266

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

ROBERT WILSON and NORMA WILSON;
CLARENCE LUTTON and JUDITH LUTTON; and
WLR CONSTRUCTION, INC.,

Petitioners,

vs.

KARR, TUTTLE, KOCH, CAMPBELL
MAWER, MORROW & SAX, P.S. and
DEVITT D. BARNETT and "JANE DOE" BARNETT,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE WASHINGTON STATE COURT OF APPEALS DIVISION II

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February 4, 1992

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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QUESTIONS PRESENTED

1. Does it deny Petitioners' federally protected right of equal protection for the Washington courts to dismiss Petitioners' legal malpractice claims on motion for summary judgment when the Petitioners have come forward with affidavits of two expert witnesses whose opinions are that the Respondents' conduct was negligent and that said negligence was the proximate cause of the injury of which the Petitioners complained, where such evidence would be sufficient to present a question of fact triable to a jury in the context of malpractice claims against other types of professionals?

2. Does it deny Petitioners' federally protected rights of equal protection and due process for state common law to direct that causation be resolved as a threshold question of law for the trial court in a legal malpractice case whereas it is a question of fact for the jury in a medical malpractice case?

3. Does it deny Petitioners' federally protected right of due process for the trial court on a motion for summary judgment to substitute its opinion of what amounts to legal malpractice for the opinions of Petitioners' experts?

4. Does it deny Petitioners' federally protected right of due process for the trial court, on motion for summary judgment, to construe the

disputed facts against the non-moving party?

LIST OF THE PARTIES

This petition is submitted on behalf of Robert Wilson and Norma Wilson; Clarence Lutton and Judith Lutton; and WLR Construction, Inc., a Washington corporation.

The Respondents are Karr, Tuttle, Koch, Campbell, Mawer, Morrow & Sax, P.S.; and Devitt D. Barnett and "Jane Doe" Barnett.

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DECISIONS BELOW

The opinion of the Washington State Court of Appeals is unpublished; the text of the opinion is included in the Appendix. The decisions of the trial court also are unreported and are included within the Appendix.

JURISDICTION

The decision of the Washington State Court of Appeals was rendered on July 10, 1991. The Supreme Court of the State of Washington denied Petitioners' timely Petition for Review on November 6, 1991. The jurisdiction of this Court is invoked pursuant to U.S. CONST. art. III, § 2, and 28 U.S.C. § 1257(a) (1991).

CONSTITUTIONAL PROVISION INVOLVED

The case involves application of the Fourteenth Amendment to the United States Constitution which provides, in pertinent

part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

STATEMENT OF THE CASE

This is a legal malpractice case wherein the injured clients' case has been dismissed on summary judgment despite having made the same factual showings as would be appropriate under state law in a negligence case against a doctor or an accountant. Not only are the innocent clients victims of their attorney's negligence, but also, in being denied an opportunity to have their claims heard by a jury, they are the victims of a discriminatory state common

law which embraces different rules and standards for persons suing lawyers as distinguished from persons suing doctors.

Petitioners instituted suit on July 24, 1987, alleging that their attorney had been negligent in his representation of them. The gravamen of Petitioners' claim is that their attorney affirmatively advised them to engage in conduct which amounted to a breach of their fiduciary obligations to a minority shareholder. Petitioners' actions pursuant to the advice of their attorney gave rise to a suit against them by the minority shareholder, which suit demanded an accounting for the operation of the corporation after the minority withdrew from active management of the company. According to Petitioners' experts, the minority shareholder's suit had "great

weight and impetus." Not long after firing Respondents and after Respondents refused tender of the defense of the minority's claim, Petitioners' settled with the minority shareholder and this suit for damages ensued.

Petitioners also allege, and their experts decry, other errors by the Respondent attorney, including failing to draft legal documents which effected the intent of the parties, knowingly misapplying the buy-out formula specified in the controlling shareholder agreement (so as to minimize the projected payout to the dissenting minority); and, knowingly placing into a redemption account fewer funds than legally necessary to terminate the minority shareholder's ownership interest in the company (i.e., failing to effectively

cut-off the dissenting shareholder's rights to share in the growth of the value of the corporation after he withdrew).

Respondents, one of the largest and most powerful law firms in Washington State (which has an elected judiciary), filed an Answer on January 6, 1988, generally denying liability. Respondents also counter-claimed for some $5,635.12 of unpaid legal fees (plus statutory interest). In October 1988, Respondents moved for summary judgment. Petitioners timely responded with, among others, the affidavits of two highly regarded expert witnesses who each opined that the Respondent attorney's conduct fell below the standard of care of a reasonably prudent attorney acting under the same or similar circumstances in the State of

Washington and that there was ample evidence upon which a jury could conclude that his conduct was the proximate cause of the injuries of which Petitioners complained. Affidavit of Robert Gould (hereinafter Gould Aff.) at paras. 10-11, 13; Affidavit of Douglas M. Branson (hereinafter Branson Aff.) at para. 9. Both experts' affidavits provided specific examples of how the Respondent's conduct was deficient and specific examples of what the reasonably prudent attorney would have done instead. Gould Aff. at paras. 5, 6, 10; Branson Aff. at paras. 5-8.

Notwithstanding the affidavit testimony, the trial court granted the Respondents' summary judgment motion, concluding:

> The only thing in the affidavits that I would give

any credence to at all, might be bad judgment in representing two out of three shareholders in a corporation when you represented the whole corporation. But if anybody had a complaint about that, it's Mr. Retherford, not Wilson and Lutton. ... There is nothing to suggest that Mr. Barnett, other than Monday Morning Quarterbacking because he wasn't able to get the desired result, operated at a level below the appropriate standard of care for an attorney practicing either in a general practice or frankly with a specialized business practice.

The Affidavits claim that Mr. Barnett seems to have failed to note a distinction between the redemption and liquidation and dissolution of a company. I don't think that's true at all.

...I've been going through the Affidavits of Gould and Branson and see absolutely nothing other than looking at this after the fact and deciding that perhaps they would have done it another way other than the criticism of representing, as I say again, two of three shareholders when they've represented the corporation. But I see absolutely no causal

> connection between that and any claimed damages. ... There's no causal connection between the failure to or the refusal to represent any of these people and the end result that the Court sees.

Report of Proceedings April 10, 1989 (hereinafter R.P.I.) at 87-92 (Appendix pp. 34A-42A.

Petitioners then timely sought reconsideration before the trial court. The record was supplemented with six additional affidavits and a supporting legal memorandum. The supplemental affidavits highlighted the Petitioners' reliance upon the attorney's advice and the experts' opinions that, "but for" the Respondent attorney's conduct, Petitioners would not have sustained the financial losses of which they Complain. For example, the supplemental affidavits of the Petitioners disclosed:

> Mr. Barnett told me many times to quit worrying about our dispute with Phil Retherford. He would say 'I don't know what I have to do to get you to stop worrying; you're in the driver's seat and you're in goods hands.' Because he was the expert and educated in legal matters I trusted him implicitly and did what he said to do. ... My husband and I had no experience in things like this.

Second Supplemental Affidavit of Norma Wilson (hereinafter N. Wilson 2d. Supp. Aff.) at paras. 3, 5.

> I did not know what to do about getting Phil paid his share of the corporation when he wanted out. I didn't have any experience in such matters and I don't have very much school type education. That was Mr. Barnett's job. Mr. Barnett was our counsel and I relied upon him and did what he said to do. ...

Supplemental Affidavit of Clarence Lutton (hereinafter Lutton Supp. Aff.) at para. 9.

Mr. Barnett, on various

> occasions, advised me and my wife and Mr. Lutton that we could do as we pleased with corporate assets and opportunities. He was always telling us not to worry, Phil could not come back on us. ...
>
> Mr. Barnett was the expert so I would agree to do things his way. The terms of the deals and the way to present things were Devitt's way, not ours. He was the authority. Devitt never told us the reasons not do things. He told us what to do. I am a mechanic not a lawyer, and because Mr. Barnett was trained we did things his way, not ours. Mr. Barnett never told me that the effect of the papers we signed in January 1985 was that Phil Retherford would be entitled to a one-third share at January 5, 1985; I thought he would be getting one-third as of the time he left the corporation, in July. Mr. Barnett told me that the dissolution was better than the shareholder agreement. It was the best thing we could have happen to us.

Supplemental Affidavit of Robert Wilson (hereinafter R. Wilson Supp. Aff.) at paras. 3, 6-7.

The Supplemental Affidavits of Petitioners' experts disclosed:

> It is my personal opinion that there is no question that Mr. Barnett's conduct delineated in my affidavit of October 31, 1988 did cause the plaintiffs' damage of which they are complaining in their complaint.

Supplemental Affidavit of Robert B. Gould (hereinafter Gould Supp. Aff. at para. 3.

> In my previous affidavit I phrased my opinion with regard to causation in the fashion which I did because my professional opinion is that causation in a legal malpractice case is a question of fact to be resolved by the jury. To the extent that the Court, by its ruling on April 10, 1989, believes that expert testimony on causation in this matter is appropriate, my opinion is that Mr. Barnett's failure to adhere to the applicable standard of care was the direct and proximate cause of the injuries of which the Plaintiffs complain in their Complaint. In my personal opinion, Plaintiffs incurred legal and accounting expenses far greater than would have been the case if the

Shareholder's Agreement had been adhered to in the first place, or if the Dissolution had been completed, or if the Dissolution had been properly rescinded. Furthermore, my personal opinion is that the Plaintiffs' failure to dissolve the corporation and their use of its assets for personal gain harmed the minority shareholder and gave great weight and impetus to the suit brought by Mr. Retherford against the Corporation and the directors. Assuming to be true the Plaintiffs' testimony that they acted pursuant to Mr. Barnett's recommendations and advice, then, in my opinion, but for Mr. Barnett's negligence, Plaintiffs' exposure to Mr. Retherford would have been much less. This is why in my deposition I stated that Judge Morrison's ruling in May 1986 only dealt with one part of the case, and did not deal with Mr. Retherford's prayer for an accounting of the use of the assets of the corporation by the directors subsequent to the vote to dissolve. See Retherford v. Wilson, et al., Superior Court Cause No. 85-2-01759-1, Amended Complaint.

In sum, it is my expert opinion that there is malpractice in one or more instances committed

> by Mr. Barnett. Further, my personal opinion is that both causation and injury exist as Plaintiffs allege.

Branson Supp. Aff. at paras. 3-4.

Again, the trial court denied Petitioners' pleas for relief. The trial court reaffirmed its previous determination, stating in pertinent part:

> ...[t]he only thing that has ever even reached the level of even questionable conduct in my mind is the business of representing some of the shareholders and not all of them when you represent a corporation and the shareholders get into dispute. But that is not Wilson and Lutton's cause of action ... unless that fact alone caused them some damage.... [A]ll we really have here ... are a series of judgment calls....

Report of Proceedings May 12, 1989 (hereinafter R.P.II.) at 23-25 (Appendix at pp. 48A-49A).

Petitioners promptly sought relief in the Court of Appeals. The matter was

briefed during October 1989-February 1990; oral argument was heard December 4, 1990. By decision rendered July 10, 1991, the Court of Appeals affirmed the trial court's grant of summary judgment in this case. The Court of Appeals did not reach the issue of whether there was evidence that Defendant was negligent. Instead it assumed arguendo that there was negligence and focused upon causation. The Court of Appeals decision is founded upon the notion that "there is no showing of a causal connection between [Respondent's acts] and the complained of result." Slip Opinion at 7 (Appendix at p. 12-A).

As regards causation, the appellate opinion completely ignores the salient fact that the Respondent attorney affirmatively counseled the Petitioners

to engage in conduct which amounted to a breach of their fiduciary obligation to the minority shareholder. The appellate opinion completely ignores the central fact that the Respondent attorney failed to explain to his clients the difference between a redemption of the minority shareholder's shares and a dissolution of the corporation (the latter course of action giving the minority an ownership interest in the increase in value of the company which accrued after he demanded that his shares be redeemed). Further, the Court of Appeals opinion completely ignores the quintessential fact that the attorney did not place enough money in the redemption account to terminate the minority's ongoing ownership interest in the corporation. The Court of Appeals focuses merely on the settlement process

and concludes that it is not the Respondent attorney's fault that the minority shareholder would not settle for less than he ultimately did.[1]

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[1] The specific dollar amounts reflected in the Court of Appeals opinion (which correspond to book value indicia) reflect a complete misunderstanding of the minority's claim, which was not just for his one-third share in the net asset value. The minority also had a damages claim for misappropriation of corporate opportunity -- which meant that the "value" of the minority's "interest" was greater than the corporation's financial statement would indicate was his one-third share of the net equity. Furthermore, it is overly simplistic to assert that the claimed damages are that Plaintiffs had to pay more than one-third of the corporation's book value to settle -- Plaintiffs also sustained legal and accounting fees vastly in excess of what would have been incurred had the matter been properly handled. They also are entitled to a refund of the monies paid to the Defendant attorney's firm to handle the matter which he mishandled. See e.g., Financial General Bankshares, Inc. v. Metzger, 523 F. Supp. 744 (D.D.C. 1981) (vacated on other grounds, 680 F.2d 768 (D.C. Cir. 1982)); In Re Hansen, 586 P.2d 413 (Utah 1978); Jeffry v. Pounds, 67 Cal.App.2d 6, 136 Cal. Rptr. 373 (1977).

As regards Petitioners' state and federal constitutional claims, the Washington Court of Appeals, with no discussion of the pertinent authorities, merely concluded that Petitioners were being treated the same as plaintiffs in other professional negligence cases. The Court of Appeals just "flatly disagreed" that the judicially enacted "two-step" inquiry directed by common law to be followed in legal malpractice cases is any different from the legal standard pertinent to other types of professional negligence.

The "two-step analysis" entails breaking the elements of an ordinary professional negligence claim into two parts each. For example, ordinarily the plaintiff must show there was a duty (client/patient relationship), a breach

of that duty (failure to adhere to the standard of care), and causation of injury. In the legal malpractice context, the question of the duty owed is both a legal and a factual question; the question of a breach of the duty is a legal and factual question; and, the question of causation is a legal and factual question. See generally 2 R. Mallen & J. Smith, Legal Malpractice, sect. 27.10 (3d ed. 1989). For example, the determination of negligence entails two questions: did the attorney err? If so, was the error caused by his/her negligence? The first question is for the judge and the second question is for the jury. So too, the determination of causation entails a threshold determination by the court whether the attorney's negligence caused a loss and

if so, an ultimate determination by the jury whether the loss caused damage to the client.

Contrary to Mr. Mallen's and Mr. Smith's beliefs, determining whether the attorney erred is really a factual question; it is only because the subject field of practice is "law", that there is a "legal question" to the determination of negligence and causation. However, to say that it is a legal question (or question of law) whether the attorney erred does not dictate that the judge should decide if, in fact, there is an error. Rather, the proper role of the judge is to decide if there is evidence that there is an error.

This point is more obvious in the context of medical malpractice: whether the doctor made an error is a fact

question for the jury based upon expert medical opinion about whether the defendant doctor adhered to the appropriate standard of care. The judge does not decide if the doctor erred, even if the judge has an M.D. The judge's role is confined to deciding if the plaintiff has come forward with expert testimony setting forth the standard of care and stating if there has been a failure to conform to it. In the situation of a legal malpractice claim, just because the judge is a lawyer does not make it more appropriate for the court to decide a disputed factual issue. Notwithstanding Mallen & Smith's commentary, whether the attorney erred is a fact question for the jury based upon expert legal opinion about whether the defendant attorney adhered to the

appropriate standard of care.

Two federal circuit courts of appeal have recognized the due process implications of assigning to the judge the responsibility for determining what are essentially factual issues. See Lentino v. Fringe Employees Plans, Inc., 611 F.2d 474, 481 (3rd Cir. 1979); Bonhiver v. Rotenberg, Schwartzman & Richards, 461 F.2d 925, 929 (7th Cir. 1972). In considering whether expert testimony is required in a legal malpractice case, the Third Circuit explained,

> we conclude however that the better approach is to apply the same requirement to both bench and jury trial. First, although the judge may be competent to evaluate defendant's conduct in light of the relevant standard of care, the actual standard of care itself is a question of fact that is best left to the presentation of evidence with

the opportunity for cross-examination and rebuttal. Cf. Bonhiver v. Rotenberg, Schwartzman and Richards, 461 F.2d 925, 928-29 (following Illinois Supreme Court statement that a determination based upon private knowledge of the court constitutes a denial of due process); Appeal of Ritter, 147 Pa.Super. 236, 24 A.2d 470 (1942)(judge in assessment case may not base decision on personal knowledge). Second, we do not believe that a practicable standard exists which takes into account the trial judge's knowledge. Such a subjective standard, which would allow the trial judge to use his own knowledge if he were familiar with the appropriate standard of conduct, would effectively change a question of factfinding into one of discretion and require appellate courts to undertake the unwanted task of evaluating the trial judge's personal knowledge. Finally, in the interest of uniformity, we prefer not to unnecessarily establish a different substantive requirement for bench trials than for jury trials. Accordingly, we conclude that the trial judge was correct in holding that expert testimony is required in

> bench trials of legal malpractice claims except where the matter under investigation is so simple, and the lack of skill so obvious, as to be within the range of the ordinary experience and comprehension of even non-professional persons.

611 F.2d at 474 (footnotes omitted). The Lentino court, accordingly, did not reach the question presented here, whether permitting the judge to use his own knowledge to set the standard of care would violate due process. See id., 611 F.2d at 481, n. 11. That precise question was faced in Bonhiver, supra, where the Seventh Circuit squarely held:

> Plaintiff asserts ... judges must be taken as being sufficiently knowledgeable with regard to the applicable standards of legal practice to determine whether [attorney's] conduct was negligent. Although the argument has superficial appeal, it ignores applicable case law with regard to whether judges may decide lawsuits based on their

> independent knowledge of the facts [which due process prevents].

Id., 461 F.2d at 928-929.

Essentially, allowing the judge to decide factual issues such as negligence and causation results in the anomalous situation that the outcome of the case is determined by the judge's educational training and personal biases. See also Lentino v. Fringe Employees Plans, Inc., supra,

> Furthermore, any objective standard which required an expert except where an "ordinary judge" would know the applicable standard not only would require the creation of an entirely new body of law, but would also require reviewing courts to determine whether the trial judge possessed the knowledge of some theoretical ordinary judge, a creature far more difficult to define than an ordinary person.

Id., 611 F.2d at 481, n. 12.

With the exception of the above-

mentioned federal cases which recognize the existence of due process issues, no reported decision faces the issue posed by this case, namely, whether the "two-part test" (which injects the judge into what is actually a factual inquiry) violates rights to due process and equal protection afforded by the Unites States Constitution.

RAISING OF CONSTITUTIONAL ISSUES BELOW

The constitutional issues presented by this Petition were called to the attention of the Court of Appeals in Petitioners' Opening Brief at p. 48, and their Reply Brief at pp. 14-20. They were called to the attention of the Washington State Supreme Court in Petitioners' Petition for Review at pp. 11 to 13. The pertinent portions of these materials are set forth in the

Appendix.

REASONS WRIT OF CERTIORARI SHOULD ISSUE

This Court should grant this Petition because of the far-reaching impact of treating victims of professional negligence differently depending upon whether they have been hurt by a doctor or a lawyer. Both due process and equal protection rights are violated by this discriminatory procedure, which has the obvious effect of eroding the public's confidence in the fairness and unbiased nature of the legal system. Since this case presents a judicially enacted barrier to an injured party's claim being heard, and involves what really amounts to improper judicial activity, it is particularly apropos that the Supreme Court exercise its supervisory powers and examine the unconstitutional procedures

being followed by several state courts.

The federal constitution's due process protection (U.S. CONST. amend. XIV, sect. 1) requires the state to observe its own constitutional protection and "the settled course of judicial proceedings." Walker v. Sauvinet, 92 U.S. 90 (1985). In the instant case, there has been an utter failure of the state court of last resort to observe the state constitutional protections of the right to a jury trial, equal protection of the laws, and due process. In the instant case a professional negligence claim has been dismissed on motion for summary judgment notwithstanding that the evidentiary showings ordinarily required in negligence cases have been met and that under such circumstances summary judgment is not proper.

It is important for this Court to hear this case because there is a nationwide crisis in the public's confidence in the courts and the fairness of the legal system. The dismissal of this case is an act so far from the accepted and usual course of judicial proceedings that members of the public cannot help but question whether the judiciary is "protecting its own", at the expense of lay citizens.

This case and the applicable legal rulings show members of the general public a Washington common law procedure which permits a judge to usurp the fact finding role reserved for the jury (typically non-lawyers). Citizens see the court erect a special hurdle for victims of a lawyers' negligence (namely "the two-step test"). They see the court

apply this unusual standard to resolve disputed factual issues in favor of a large and prestigious law firm. This special process, used when the defendant is a lawyer, diminishes public confidence in the fairness of the legal system and portrays to the citizenry that it is pointless to seek relief when injured at the hands of an attorney.

The Washington common law "two-step" approach to resolving summary judgment motions in legal malpractice cases has a specific far-reaching impact upon other similarly situated litigants both within and without Washington State. Attorneys, like members of other professions, sometimes commit malpractice. Yet, the special "two-step" approach to evaluating summary judgment motions presents an effective bar to cases reaching a jury of

reasonable men and women who are the victim's peers. To the extent that other states' courts follow Washington methodology, the number of impacted individuals is greatly magnified.

Furthermore the practical application of the "two-step analysis" is to render the role of the jury a nullity. This is because if the judge decides as threshold whether the attorney erred and whether the attorney's conduct caused an injury, after the first step of the inquiry, a directed verdict on liability is required. Use of the "two-step analysis" essentially means that all that is left for the jury to decide is the amount of the damages! Instead the court should be deciding if there is any evidence on the record that the attorney erred and is there any evidence of

causation. Those are the questions of law which commentators Mallen & Smith misapprehend. See Mallen & Smith, Legal Malpractice, supra, at sect. 27.10; see also pp. 17 to 24, above.

By directing the "two-step analysis" and allowing judges confronted with summary judgment motions to substitute their personal opinions about negligence and causation for the opinions of experts testifying on behalf of the non-moving party, the Washington courts have not only violated due process but also they have created two classes of plaintiffs: namely, victims of a lawyer's negligence and victims of other professional negligence. In the former case, the court is permitted to substitute its opinion for that of the expert; in the latter it is not. In the former case

disputed material facts are resolved by the judge without a trial; in the latter case, the disputed material facts are resolved by the jury at trial. No legitimate state interest supports the differential treatment of these two classes of plaintiffs. The constitutional guarantees of equality in treatment are violated.

That the Fourteenth Amendment's equal protection clause prohibits just this sort of discrimination among similarly situated persons and is a justifiable basis upon which to grant a petition for writ of certiorari is underscored by this Court's decision in City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) (reversing unequal treatment of similarly situated applicants for a land use permit on equal

protection grounds). See also Griffin v. Illinois, 351 U.S. 12 (1956) (where a statutory criminal procedural rule which granted procedural protections to one group of citizens but not to another was reviewed on due process grounds).

It is vital that the questions presented be resolved by this Court not only because it is Petitioners' last hope for relief, but also because the "two-step analysis" embraced by the Washington courts is described as the proper approach by one of the nation's leading commentators upon legal malpractice and is being followed by courts in several States. See 2 R. Mallen & J. Smith, Legal Malpractice, § 27.10, at pp. 652-660, (3d ed. 1989) and cases therein cited.

The Mallen treatise is very

influential and is looked to by judges nationwide. As more courts embrace this discriminatory "two-part test", more and more courts will become convinced that it is indeed a proper methodology. This Court should intervene to set things straight especially because the nuances of equal protection are sometimes difficult for lower courts (and advocates appearing before them) to fully apprehend. So too, the due process implications of the "two-part test" seem to have been entirely ignored by the reported decisions which apply it.

The purpose of summary judgment is not to prove a party's case beyond a preponderance of the evidence, but rather it is to demonstrate that the plaintiff will be able to come forward with evidence at trial on which a jury may

ultimately base its decision. E.g., Adickes v. Kreso & Co., 398 U.S. 145 (1970); Almy v. Kvamme, 63 Wash.2d 326, 387 P.2d 372 (1963). Here the Petitioners have come forward with affidavits of experts which state unequivocally and with specificity that in their opinions the observed deficiencies in Mr. Barnett's conduct in fact caused the Petitioners' injuries. Yet, inexplicably this showing was held inadequate to survive a motion for summary judgment. Well-settled procedural standards are being ignored. E.g., Ward v. Arnold, 52 Wash.2d 581, 328 P.2d 164, 166 (1958). Indeed, in the medical malpractice context, the Supreme Court of Washington recently held "[i]t is not always necessary, however, to prove every element of causation by

medical testimony. If, from the facts and circumstances and the medical testimony given, a reasonable person can infer that the causal connection exists, the evidence is sufficient. Douglas v. Freeman, 117 Wash.2d 242, ____ P.2d ____ (1991).

An injured party who sues a lawyer is entitled to no less due process than one who sues a doctor. This Court should make this clear to the lower courts.

CONCLUSION

For the reasons stated above, Petitioners pray that their Petition for Certiorari be granted.

Respectfully submitted,

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February 4, 1992

CERTIFICATE OF SERVICE

I, Carol MacKinnon, an attorney for petitioners and a member of the Bar of this Court, certify that on this 4th day of February, 1992, the foregoing Petition for Certiorari and Appendix thereto, consisting of one volume, was served upon Respondents by mailing three copies thereof first-class, postage prepaid, to each of the following:

Ron Leighton
GORDON THOMAS HONEYWELL MALANCA
PETERSON & DAHEIM
2200 First Interstate Plaza
1201 Pacific Avenue
Tacoma, WA 98402
(206) 572-5050

I further certify that all parties required to be served have been served.

CAROL MACKINNON

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IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON

ROBERT WILSON and NORMA WILSON, husband and wife; CLARENCE LUTTON and JUDITH LUTTON, husband and wife; and WLR CONSTRUCTION, INC., a Washington corporation,	NO. 12856-0-II
	Division Two
	Unpublished Opinion
Appellants,	
v.	
KARR, TUTTLE, KOCH, CAMPBELL, MAWER, MORROW & SAX, P.S., a Professional Service Corporation; and DEVITT D. BARNETT and JANE DOE BARNETT, husband and wife, and the marital community composed thereof,	
Respondents.	Filed July 10, 1991

ALEXANDER, J. -- Robert Wilson, Clarence Lutton, and WLR Construction, Inc. each appeal a summary judgment

dismissing their negligence action against Devitt Barnett, the attorney for WLR Construction, Inc. They claim that Barnett failed in his duty to the corporation, proximately causing harm to the corporation and thereby to Wilson and Lutton as shareholders of the corporation.

In 1983 Wilson and Lutton entered into a business relationship with Philip Retherford. The three men were the sole shareholders of WLR Construction, Inc., a company which provided earthmoving services to King County at the County's landfill. They each owned one-third of the outstanding shares of the corporation. Devitt Barnett was the attorney for WLR from the time it was incorporated, December 1983, until he was replaced as the corporation's attorney in

March 1986. Barnett, a member of the law firm of Karr, Tuttle, Koch, Campbell, Mawer, Morrow & Sax, (Karr Tuttle), also served as the attorney for Lutton, Wilson, and their spouses.

Viewing the facts most favorably to Wilson, Lutton and WLR, it appears that Wilson, Lutton, and Retherford had an agreement which obligated the corporation or the remaining shareholders to buy the shares of a shareholder relinquishing his interest in the corporation. The purchase price for the shares was to be equal to the book value of the shares to be determined at the close of the fiscal quarter next preceding the date of the transfer of shares. The agreement also contained an arbitration clause which provided:

> Any controversy or claim arising out of or relating to

> this Agreement or the breach thereof shall be settled by arbitration in accordance with the rules then obtaining of the American Arbitration Association . . .

In July 1984, Retherford resigned as officer and director of WLR, effective September 1, 1984. He demanded $90,000 for his one-third interest in the shares of the corporation and an additional $8,442 as repayment of a loan he had made to WLR. Wilson and Lutton responded by offering Retherford $30,000. Retherford refused that offer. Barnett, on behalf of Wilson and Lutton, then made an offer of $3,103.97,[1] plus repayment of the loan and an additional $15,000 for a non-competition agreement. Retherford

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[1] Appellants assert that the correct date for valuation was August 31, 1984. They contend that as of that date the shareholder equity was $55,463 and that Retherford was entitled to $18,487 as his one-third share.

refused that offer.

Because the parties were unable to reach an agreement, despite a suggestion by Barnett that the three enter into arbitration, Wilson, Lutton and Retherford agreed to a suggestion by Retherford's lawyer, Alan Mayhew, that the corporation be dissolved and the assets be divided.

Barnett then wrote to Mayhew and indicated that because all three shareholders had personally guaranteed the corporation's obligations on the leases and loans by which the corporation's earth scrapers were acquired, a realignment of these obligations and guarantees would be required before dissolution of the corporation and distribution of its assets could take place. There are no

corporate minutes or resolutions which reflect any discussion or action by the three shareholders regarding this realignment. In any event, one of the lessors of the earth scrapers would not agree to a realignment of the lease because of his concern about the fact that Wilson was the only shareholder with sufficient assets to personally guarantee performance under the lease.

On February 21, 1985, Barnett, on behalf of Wilson, Lutton, and WLR, offered to allow Retherford to take one of the earth scrapers valued at $19,500, [2] and to repay him for his capital stock account and his loan account in exchange for a transfer of his shares. Barnett, unable to get Retherford to accept that

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[2] Current appraised value according to Barnett.

offer or make a counter offer, established a $12,495 account to settle with Retherford.

On March 27, 1985, Retherford filed a shareholder's derivative suit seeking an accounting. Wilson, Lutton and WLR responded by filing a motion to stay proceedings and compel arbitration. The court reserved ruling on that motion and set a trial date of May 21, 1986 on the issue of whether the shareholder agreement had been suspended by the decision to dissolve the corporation.

A year later, in March, 1986, Mayhew recommended that Retherford take $35,000 in full settlement. That offer was not conveyed by Barnett to the Corporation, Wilson or Lutton because on March 25, 1986, Wilson and Lutton fired Barnett and hired another attorney to represent them

and the corporation.

Wilson, Lutton and WLR moved for summary judgment contending the shareholder agreement was not superseded by the dissolution resolution. The trial court denied the motion, concluding that dissolution of the corporation was inconsistent with the notion of any ongoing vitality of the shareholder agreement and that the dissolution plan was not subject to any contingencies. It held that the dissolution plan was still in effect and directed that the corporation be dissolved, attorney fees for both sides should be paid first, and the balance be divided equally between Wilson, Lutton and Retherford.

On January 27, 1987, Retherford agreed to take $27,500 and two earth scrapers in return for his shares. The

net asset value of the company at that time is not clear from the record, although the complaint indicates that the value of the settlement is $98,500.

On July 24, 1987, Wilson and Lutton, on behalf of themselves and WLR, brought suit against Barnett and Karr Tuttle in Pierce County Superior Court, alleging that Barnett had been negligent in his representation of WLR, Wilson, Lutton in the dispute between the corporation and Retherford. Essentially, they claimed that Barnett should have taken different action which, according to them, would have resulted in fewer legal costs and a more favorable settlement with Retherford than the one that was ultimately obtained. In support of their position, they presented affidavits from two experts, who opined that Barnett was

negligent and that his negligence was the proximate cause of the injuries to Wilson, Lutton and WLR. The trial court concluded that Barnett had not been negligent and that there was no causal connection between his acts and the claimed loss.

"A motion for summary judgment is properly granted if there is no genuine issue of fact as to any material element necessary to support a claimed cause of action." Peoples Nat'l Bank of Wash. v. Ostrander, 6 Wn. App. 28, 32, 491 P.2d 1058 (1971). Assuming facts most favorable to the nonmoving party, this court engages in a de novo review making the same inquiry as the trial court. It looks to the pleadings, depositions, admissions, and affidavits to determine if there are any genuine issues of

material fact and if the moving party is entitled to judgment as a matter of law. Wilson v. Steinbach, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). Once the moving party has submitted adequate affidavits, the nonmoving party has the burden of setting forth specific facts that rebut the moving party's contentions and that disclose genuine issues of material fact. Seven Gables Corp. v. MGM/UA Entertainment Co., 106 Wn.2d 1, 13, 721 P.2d 1 (1986).

Wilson, Lutton and WLR contend that the affidavits of their experts established that Barnett did not do what a reasonably prudent attorney would have done under the same or similar circumstances, and that he did things that a reasonably prudent attorney would not have done. They assert that because

Barnett did not offer an expert to rebut their expert testimony, and because they are entitled to have their evidence viewed in the light most favorable to them, the trial court erred in concluding that there was no negligence on Barnett's part. We need not decide that question because even if we assume that appellants sufficiently established negligence on the part of Barnett, there is no showing of a causal connection between his acts and the complained of result.

Wilson, Lutton and WLR contend that the affidavits of their experts are specific enough to establish causation. Barnett responds that there was no causal connection between the alleged negligent acts and the claimed damages. He contends that the experts' statements that there was a breach that caused

damage is insufficient because the experts made broad allegations containing conjecture and speculation, and did not base their allegation on specific facts. Rorrer v. Cooke, 313 N.C. 338, 329 S.E.2d 355 (1985).

Proximate cause is defined as:

> [A] cause which in a direct sequence, unbroken by any new independent cause, produces the injury complained of and without which the injury would not have happened.

Petersen v. State, 100 Wn.2d 421, 435-36, 671 P.2d 230 (1983). It consists of two elements: (1) Cause in fact which refers to the actual ("but for") consequences of an act; and (2) legal causation which requires a determination of whether liability should attach as a matter of law. Braegelmann v. Snohomish Cy., 53 Wn. App. 381, 384, 766 P.2d 1137 (1989) (citations omitted).

Here, there is no causal link between the actions of Barnett and the result. Barnett did not cause Retherford's refusal to settle. The highest value established, pursuant to the agreement, for Retherford's one-third of the corporation's share was $18,487. At the time that settlement under the agreement was possible, Retherford refused offers of up to $30,000. Barnett's several offers of less cannot, therefore, be said to have "caused" the refusal to settle.

Second, the failure to enforce the Agreement was not "caused" by Barnett. Wilson and Lutton declined to arbitrate as called for under the agreement and the dissolution of the corporation was agreed to by all three shareholders. The dissolution did not take place because

the debt could not be realigned. The inability to realign the debt was not caused by Barnett.

Finally, the ultimate settlement occurred after Barnett had been discharged as attorney for Wilson, Lutton and WLR. He did not, therefore, "cause" a settlement for more than the obligation under the agreement as of August 31, 1984.

Barnett **[sic; probably referring to Plaintiffs]** contends that the question of whether an attorney erred is by its nature a factual question that can only be decided by a jury on the basis of expert testimony. Sofie v. Fibreboard Corp., 112 Wn.2d 636, 771 P.2d 711, 719-722, 780 P.2d 260 (1989). Engaging in the two step inquiry, he argues, results in a substitution of the trial judge's

opinion for what constitutes the standard of care in legal malpractice cases and thus discriminates against plaintiffs who are injured by lawyers as opposed to doctors or accountants. We disagree. The plaintiff in a legal malpractice action has the same obligation to demonstrate an issue of material fact as to causation as does the plaintiff in any other negligent action. The plaintiffs here failed to meet this obligation.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

/s/

WE CONCUR:

/s/

/s/

THE SUPREME COURT OF WASHINGTON

ROBERT WILSON and NORMA WILSON, husband and wife; CLARENCE LUTTON and JUDITH LUTTON, husband and wife; and WLR CONSTRUCTION, INC., a Washington corporation,	NO. 58470-2
Petitioners,	C/A NO. 12856-0-II
vs.	
KARR, TUTTLE, KOCH, CAMPBELL, MAWER, MORROW & SAX, P.S., a Professional Service Corporation; and DEVITT D. BARNETT and JANE DOE BARNETT, husband and wife, and the marital community composed thereof,	
Respondents.	

This matter came before Department I of the Court on its November 6, 1991, Motion Calendar on Petition for Review.

Department I having considered the Petition and the files herein;

Now, therefore, it is hereby

ORDERED:

That Petition for Review is denied.

DATED at Olympia, Washington this 6th day of November, 1991.

/s/

CHIEF JUSTICE

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

ROBERT WILSON & NORMA WILSON, husband and wife; CLARENCE LUTTON and JUDITH LUTTON, husband and wife; and WLR CONSTRUCTION, INC., a Washington corporation,	)	
Plaintiffs,	)	
vs.	)	NO. 87-2-04812-3
KARR, TUTTLE, KOCH, CAMPBELL, MAWER, MORROW & SAX, P.S., a Professional Service Corporation; and DEVITT D. BARNETT & JANE DOE BARNETT, husband and wife, and the marital community composed thereof,	)	
Defendants.	)	

VERBATIM REPORT OF PROCEEDINGS

BE IT HEREBY REMEMBERED that the above-entitled and numbered cause came on for hearing before the HONORABLE J. KELLEY ARNOLD, sitting in Dept. 9 of the Superior Court for Pierce Co., on the 10th day of April, 1989.

MS. CAROL MacKINNON, ESQ., 403 Rainier Bank Building, 1102 Broadway Plaza, Tacoma, WA 98402 appearing on behalf of Plaintiffs;

MR. RONALD B. LEIGHTON, ESQ., 2200 First Interstate Plaza, Tacoma, WA 98401 appearing on behalf of Defendants.

WHEREUPON, the following proceedings were had and done, to wit:

. . .

THE COURT: Thank you for your patience and the delay at the beginning of the afternoon. I do want to assure you and your clients, each of you and your clients, that I have had the opportunity because you've given me the opportunity by presenting your materials early on to review all of the materials that you've discussed this afternoon, and some of those that you haven't, you haven't discussed, but have submitted,

and I feel comfortable in determining whether or not there are any genuine issues of material fact to be resolved in this litigation.

The Court, of course, has in mind the fact that it must look at the evidence before it in a light most favorable to the Plaintiffs. I guess that I won't refer for purposes of the record in any great detail to the factual background because after it was stated by Mr. Leighton, Ms. MacKinnon indicated just those areas that she had some dispute with and as opposed to those that she was in agreement with and I have taken notes about those distinctions.

But, suffice it to say that the Wilsons, Luttons, and Retherfords in February of 1983 did in fact incorporate WLR and did have a contract for the King

County Land Refuse Removal and I guess I should say Bjorn was in on it ultimately and Wilson acquired by way of assignment Bjorn's interest.

The Court, of course, understands the leasing from Westland, A & B Cat, and the acquisition by WLR with regard to the total pieces of equipment.

It's further clear that in July of 1984 Mr. Retherford gave notice of an intent to withdraw September 1st, contemplating a transfer in mid December. It's also clear that between July 1984 and September he actually in terms of his employment status, altered that earlier, and it was--whether it was a resignation or whether he was fired for purposes of unemployment I don't think is terribly significant insofar as this lawsuit is concerned.

The parties had entered into a shareholder's agreement with regard to acquisition of any retiring, deceased, or otherwise withdrawing partner's interest in that agreement, provided for the acquisition of the withdrawing or retiring shareholder's stock by those who remained, and it fairly succinctly and in the usual fashion set forth how the stock would be valued, what date would be utilized, and up until that time I don't see that there was any particular difficulty.

Thereafter, it is clear that Mr. Retherford insofar as legal advice is concerned went his separate way, and Mr. Wilson and Mr. Lutton, who between them constituted a majority, continued to utilize the services of Mr. Barnett who had in fact incorporated WLR and had been

representing the corporation through that period of time.

It's also clear and undisputed that although the dates set forth in the shareholder's agreement with regard to the valuation of the stock was not probably July 31st, that the Wilsons and the Luttons elected with a full understanding that they didn't have to utilize that date for valuing the stock, and that they did so because they were at a juncture certainly interested in resolving the problem at an early date, and they felt that that would be the fairest way to deal with Mr. Retherford, and that they made the offer of $30,000 which was rejected by Mr. Retherford.

Further, it is undisputed, at least the Court finds it was undisputed, that in discussions with Mr. Barnett and the

accountant options were discussed and that the Luttons and the Wilsons were not in full accord, and this is early on with regard to what to offer Mr. Retherford, and there's nothing unusual about that. Certainly, I think we all know that even though we have a specific formula for valuations, that playing with numbers can perhaps create different results.

In any event--and there's also a certain value perhaps in offering a little bit more to somebody than you think they should have in order to resolve the problem early or perhaps to offer a little bit less in anticipation of some sort of negotiation. I don't see it as an exact science, and I don't think any reasonable attorney would.

It's clear that thereafter the Wilsons were aware that arbitration was a

possibility. It may be somewhat unclear as to exactly when they learned of that. It's clear that Mr. Wilson was in poor health and that the Wilsons really didn't want to make a big deal out of this. They wanted to resolve it early on. Poor health may have been a part of that, but it sounds to me from what I've heard that they never really wanted this to become an extended problem.

Now, it's also clear to me, at least from what has been disclosed in all of the evidence here, that Mr. Retherford was being obstinate and there isn't anything in the record before the Court that would indicate that he, and I'm speaking of his counsel, that he was cooperative, that he offered in any way to make an independent valuation, to take any hard look at anybody else's

valuation.

It's clear that thereafter Mr. Retherford's attorney suggested the possibility of a dissolution of the corporation, which certainly given the posture of the parties at the time it was not an unreasonable suggestion in terms of how this dilemma might be resolved. It is clearly an option, especially if it's at a time when the company isn't anticipating or doesn't have on their appointment book a great deal of work lined up. And even if it does, there of course, are ways of handling that.

But it seems that Mr. Mayhew's suggestion was one that Mr. Barnett talked over with his clients and responded somewhat positively, but with of course the further caveat that in order to have a true dissolution you have

to consider the liabilities as well as the assets, and that's going to require some sort of debt realignment. And that in January of 1985 Mr. Barnett prepared a dissolution plan and was somewhat entangled, and I don't mean that in an ugly sense, but it was aborted. I think might be a better way of putting it, because of the assignment of the leasehold interest of People's Bank, and then in February of 1985 Mr. Barnett contacted Mr. Mayhew and offered the--I think it turns out to be $19,900 which is at the dollar per share value of the 400 shares of stock in 1985 in equipment and that was rejected by Mr. Retherford.

It's also clear that when that offer was made, that an invitation was made for some sort of counterproposal if Mr. Retherford wanted to do it differently

with regard to who gets what equipment, provided of course that again the debt would have to be realigned to compensate in terms of adjustment between the asset and its liability in order to work out some sort of an equal distribution.

It is also clear that with the knowledge that Mr. Barnett, Westlund sold or W & L, as opposed to WLR, then purchased from the lessor the equipment that Westland was leasing, and that Mr. Barnett aided Wilson and Lutton in making that contact to accomplish that result, and it's also clear that A & B, which of course existed prior to WLR, repossessed the equipment. The equipment, however, was intact and negotiations continued somewhat after and throughout this entire period of time.

It is clear that W & L borrowed

money from WLR, meaning Wilson and--excuse me, Lutton borrowed money from WLR and it is not at all clear that that was done with and on the advice of Mr. Barnett. Perhaps after the fact, with his knowledge. Of course, ultimately a Receiver was appointed, Mr. Weber. And I don't think I need to go into that. I have his report. I don't think I need to dwell on that.

Let me move on. And of course ultimately Mr. Barnett was discharged and Ms. MacKinnon was hired, and I suppose at this point I should digress to say pending the motion for summary judgment, depending on the motion for summary judgment are motions to amend to include successor attorney for Wilson, Lutton, Carol MacKinnon her firm's contributing part in this action, as is their motion

to compel disclosure of the means and manner in which the settlement between--ultimate settlement that Ms. MacKinnon and her law firm negotiated with Retherford were reached in order to establish the damages sought.

It is apparently undisputed that the ultimate settlement with Retherford was in the sum of something just under one hundred thousand dollars, exclusive of some other costs and fees which the Plaintiffs are seeking in this case.

Let me now digress for a moment and say that it has been suggested in terms--and I'm starting at the back end and working forward here, because I think it's germane as I see it. The Plaintiffs suggest that the Defendants are Monday morning quarterbacking in terms of this issue of damages, and their request for

discovery as to how the settlement was reached. And that may be true, but it certainly is no less true than the Plaintiffs are Monday morning quarterbacking what they allege the Defendants have done in this case. I have read and re-read, because I have never in my seven years on the bench, which I guess isn't all that long, been confronted with a situation where I have affidavits from expert witnesses that tell me absolutely nothing, and I keep reading them over and over and over again. And I guess I say that because I'm going to grant the motion for summary judgment and I feel that I owe some explanation as to how in the world I can do that when I have expert witnesses telling me that there was malpractice committed here.

The only thing in the affidavits that I would give any credence to at all, might be bad judgment in representing two out of three shareholders in a corporation when you represented the whole corporation. But if anybody had a complaint about that, it's Mr. Retherford, not Wilson and Lutton. And that of course is covered in the affidavits and I don't think that it's even arguable that that fact in any way caused the problem here.

There is nothing to suggest that Mr. Barnett, other than Monday morning quarterbacking because he wasn't able to get the desired result, operated at a level below the appropriate standard of care for an attorney practicing either in a general practice or frankly with a specialized business practice.

The Affidavits claim that Mr. Barnett seems to have failed to note a distinction between the redemption and liquidation and dissolution of a company. I don't think that's true at all. It is clear from the record that the accountant was in on this from the "get go" and that the accountant was periodically providing figures and valuations and that the Luttons and the Wilsons were just as knowledgeable as Mr. Barnett was in terms of what those figures were, and what they meant.

It is suggested that there was some violation of the standard because of the contents of 23(A).08.050, the Washington General Business Corporation Act, regarding dissolution and winding up of business. I think we have to remember that this attempt at the dissolution was

suggested and it's undisputed by Mr. Retherford's attorney and there was still once those dissolution documents were prepared, that didn't make it all happen. Mr. Retherford still was not willing to proceed then with--they weren't able to reach a settlement. Now I'm not saying that Mr. Retherford was necessarily wrong. But, it's Monday morning quarterbacking to say who should have offered more and who should have offered less, and there's absolutely no information before this Court at all other than the valuations of Leigh Frazier that give the Court any guidance at all as to what a reasonable figure would have been and the figures given, offered do not seem at all unreasonable by any standard given the knowledge that the parties had at the time.

This is a terrible thing from a client's standpoint to have this kind of thing happen, but it isn't the lawyer's fault when parties can't come to an agreement. The attorney can guide them through the legal entanglements, and if they can't resolve it outside of the courtroom, then they're led to the courtroom and in fact that ultimately happened. And I certainly don't think Ms. MacKinnon did anything incorrect. I don't think there was any inappropriate conduct on her part in how she handled the trial in Department No. 7. But, she was stuck with that result. And that arises out of the entire conduct of the parties from the beginning to the end. But the fact that the clients can't come to an agreement is not a basis for recovering from an attorney who as far as

I can see was actively involved in this affair up until the time he was discharged, and again, even as I've been speaking I've been going though the Affidavits of Gould and Branson and see absolutely nothing other than looking at this after the fact and deciding that perhaps they would have done it another way other than the criticism of representing, as I say again, two of the shareholders when they've represented the corporation. But I see absolutely no causal connection between that and any claimed damages. It isn't as though Mr. Retherford wasn't represented and there isn't any indication that Mr. Mayhew at any time complained about Mr. Barnett's continuing involvement with the majority shareholders.

Mr. Gould reaches in the tenth

paragraph a whole lot of conclusions about what he thinks a jury could possibly do. He doesn't say how in the world they're going to get there.

MS. MacKINNON: Your Honor, in the testimony submitted or attached to my Supplemental Affidavit, Mr. Gould and Mr. Branson do go into--gives more specific factual examples.

THE COURT: I did read that. That's in your Supplemental Memorandum, is it not--

MS. MacKINNON: That's correct.

THE COURT: --in opposition? Do you want to cite me to that page?

MS. MacKINNON: It's Exhibit--

THE COURT: Six or--

MS. MacKINNON: Let me back up here. Exhibit eight.

THE COURT: Oh, I'm sorry.

MS. MacKINNON: At pages 35-36 they could have revoked the statement of intent to dissolve, and page--

THE COURT: What tab are you under?

MS. MacKINNON: Tab CM-8.

THE COURT: Oh, I don't have the same index as you do.

MS. MacKINNON: It would be the Supplemental Affidavit of Carol MacKinnon.

THE COURT: Oh, all right. Now, I'm sorry. Give me that cite again. 'C' what?

MS. MacKINNON: CM-8, deposition testimony pages 35-38 and on 40, page 43, line 8:

"A. I'd say my reading of the materials made available to me demonstrated a failure of Mr. Barnett himself, or in advising Mr. Wilson and

Lutton, to advise them that they had a duty of good faith towards the withdrawing shareholder. And I think there is a strong circumstantial case that he failed to advise them of any duty of good faith because there are repeated attempts to drive the hardest bargain possible with the withdrawing shareholder."

It says that Mr. Barnett failed to adhere to the minimum standard of care of a reasonable attorney on page 49 because he did not withdraw as counsel at the time that the Receiver's Petition was filed, and certainly by the time the lawsuit was filed.

THE COURT: Well, frankly, I have--

MS. MacKINNON: Then it goes on to page 50 to explain.

THE COURT: Excuse me for

interrupting. I have read all of this. All he's doing is what could have been done and what might have been done, and the only thing that really--the only evidence of anything inappropriate here is the same thing I've said twice before, and there's no causal connection between the failure to or the refusal to represent any of these people and the end result that the Court sees.

I'm going to grant the motion for summary judgment.

. . .

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

ROBERT WILSON and NORMA WILSON, husband and wife; CLARENCE LUTTON and JUDITH LUTTON, husband and wife; and WLR CONSTRUCTION, INC., a Washington corporation,	
Plaintiffs,	
vs.	NO. 87-2-04812-3
KARR, TUTTLE, KOCH, CAMPBELL, MAWER, MORROW & SAX, P.S., a Professional Service Corporation; and DEVITT D. BARNETT and JANE DOE BARNETT, husband and wife, and the marital community composed thereof,	
Defendants.	

MOTION FOR RECONSIDERATION: MAY 12, 1989

APPEARANCES:

FOR THE PLAINTIFFS: CAROL MAC KINNON
Alling, Hudson & O'Connor
403 Rainier Bank Building
1102 Broadway
Tacoma, Washington 98402

FOR THE DEFENDANTS: RONALD B. LEIGHTON
Gordon, Thomas, Honeywell, Malanca, Peterson & Daheim
2200 First Interstate Plaza
Tacoma, Washington 98402

. . .

THE COURT: Thank you both for being here, and I am, really. A motion to reconsider -- I shouldn't say this on the record but I will -- are sometimes considered by judges as a pain in the neck. I always tell people -- they say, 'oh, isn't it tough making all these decisions,' and I say, 'no, I never take

them home with me.' And about two nights after we were here before, I just sat straight up in bed and I said, 'was I usurping the jury's function in that matter?' And I was kind of retracing the scenarios that were outlined and the affidavits of the experts. And it was somewhat of a complicated--not difficult to understand but a multitude of facts presented. So many, in fact, I think that's kind of what precipitate my question to myself or introspection about whether or not I was playing the role of the jury as opposed to the role of a judge.

So I guess what I am saying is, I am glad to be able to have a chance to resolve that issue in my mind. I love your expressions a case within a case and I think that's very well put. Perhaps

that's almost always the case when you are dealing with a legal professional negligence situation.

I will be candid enough to say this. There is this other myth. Or maybe it's not a myth. That's the question. That is, everytime you grant a motion for summary judgment, you are creating a problem because of what the appellate courts do and you have so often in those cases where they do think the court, trial court, has taken it upon themselves to be a factfinder.

I have looked at this again and again and again and I have listened to you both very carefully this morning. And in spite of the new affidavits, I keep coming back to the same thing that is so clear to me, and that is -- and let me just comment on a few of those things.

First of all, I guess the element of sympathy kind of comes to mind for the Wilsons and the Luttons because these people are so candid about coming in and saying, "You know, we went to a lawyer and we said we want to do the right thing." And I don't think there is even any dispute about that. "Help us do what's right." And that's from their perspective and they are now, of course, suing that lawyer because of the difficulties they had.

And the lawyer is in essence saying to the Court, when you sort through all of this, and even where it's, you know, recognizing any disputed areas and acknowledging them, the advice I gave seemed to be the appropriate advice at each stage of the proceeding. And of course we have missing Mr. Retherford who

everybody had to react to to some degree. He is not just a stick out there in a field. He is a live human being who is a party to that underlying action who has a lawyer to give him advice.

And still, the only thing that has ever even reached any level of even questionable conduct in my mind is the business of representing some of the shareholders and not all of them when you represent a corporation and the shareholders get into a dispute. But that is not Wilson and Luttons cause of action unless that fact alone caused them some damage. But what they are alleging is quite to the contrary. They are alleging that their lawyer was too tough and made it impossible for them to resolve the dispute in the appropriate fashion and therefore the ultimate result

brought them damages. And we keep coming back to the same thing and that is, viewing the evidence in a light most favorable to Wilson and Lutton in this case, that all we really have here, other than what I have already mentioned, are a series of judgment calls. We can talk forever about what the law is about corporations and what the dissolution processes are, and I am well familiar with them because I dissolved many a corporation in my day.

The bottom line is that there was an attempt to follow the terms of the shareholder agreement. There wasn't a whole lot of success along the way, although it appeared that there might be from time to time. The dissolution alternative became something that was worthy of discussion and ultimately was

pursued. And even looking -- and I read Judge Morrison's opinion wherein he says to Ms. MacKinnon, and it certainly is true at that point, that the client can't now undo what they did with the advice of counsel.

There is nothing to suggest, nothing, even looking at the affidavits of Branson and Gould, that what was done was a breach of any duty to Wilson and Lutton as opposed to being simply in furtherance of representing them and using your judgment at the time based on the circumstances. And the circumstances are so clearly stated by Wilson and Lutton as being 'let's try to resolve this, let's do the right thing.' 'Let's pick a date where he will get more money than he would otherwise.' 'Let's give him something that might be worth a

little bit more.' 'Let's do all of these things,' which were tried. And you can argue maybe we didn't have this offer on the table long enough, that sort of thing, but that's hindsight. We only know after the fact whether we left the offer on the table long enough because we know what happened because we did or didn't.

In any event, having said all of that, I am going to deny the motion to reconsider.

. . .

OPENING BRIEF at p. 48 stated:

. . .

While certain commentators and courts have suggested that the question of whether the attorney's conduct is not actionable because it is a matter of "business judgement" rather than an error, is a questions of law for the courts, Appellants submit that such an analysis unconstitutionally violates the equal protection clause of the federal and state constitutions. U.S. CONST. amend XIV sect. 1; WA. CONST., art. 1, sect. 12. This is because engaging in a two step inquiry of whether there was an error (question for judge), followed by whether the error was negligently committed (question for jury), results in substituting the trial judge's opinion of what constitutes the standard of care for

the opinion of the expert witnesses on this issue; to do so uniquely in the legal malpractice case discriminates against plaintiffs who are injured by the negligence of lawyers, instead of by doctors or accountants.

Even if a threshold determination of whether the attorney has erred is proper in the legal malpractice case, to take determination of this issue from the jury unconstitutionally infringes upon the plaintiff's right to trial by jury. WA. CONST., art 1, sect. 21. Whether the defendant attorney committed an error is a question requiring the opinion of an expert; the judge cannot be both witness and adjudicator. If the plaintiff submits expert testimony establishing that the attorney failed to properly discharge his obligations as counsel,

then the judge usurps the role of the jury if he/she ignores the expert affidavits. Whether the attorney erred is by its nature a factual question and can only be properly decided by a jury on the basis of expert testimony presented to it. See generally Sofie v. Fibreboard Corp., 112 Wash.2d 636, 771 P.2d 711, 719-722 (1989)(en banc).

. . .

REPLY BRIEF at pp. 14-20 stated:

. . .

II. LITERAL APPLICATION OF MALLEN AND LEVIT'S TWO PART TEST QUOTED APPROVINGLY IN HALVORSEN VIOLATES PLAINTIFFS' RIGHTS TO TRIAL BY JURY AND TO EQUAL PROTECTION OF THE LAWS.

The federal and state constitutions guarantee to all citizens the right to a trial by jury and the right to equal protection of the laws. The United States Constitution commands:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

U.S. CONST., amend. VII.

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State ... deny to any person within its jurisdiction the equal protection of the law.

U.S. CONST., amend. XIV, sect. 1. The Washington Constitution similarly provides:

> No law shall be passed granting any citizen, class of citizens, or corporation other than municipal, privileges or immunities upon the same terms shall not equally belong to all citizens or corporations.
>
> ...
>
> The right of trial by jury shall remain inviolate ...

WASH. CONST., Art. 1, sects. 12 and 21.

In Halvorsen v. Ferguson, 46 Wash. App. 708, 735 P.2d 675 (1986), the Division I Court of Appeals upheld dismissal of plaintiff's claim because there was no evidence on the record upon which to conclude that the attorney had been negligent. Instead, the plaintiff's expert affidavits conceded that the subject legal theory had been raised by the defendant attorney. The thrust of the plaintiff's claim was that the theory

had not been sufficiently emphasized. Id., 46 Wash. App. at 716, 735 P.2d at 680. In reaching its conclusion, however, the court suggested the propriety of a new test for the trial judge to impose in resolving motions for summary judgment in legal malpractice cases.

If the attorney is charged with an error regarding a legal question there are two issues to be determined.

> First, did the attorney err? Second, if so, was the error caused by the attorney's negligence? The first issue is one of law; the second is one of fact. The initial determination, resolved solely for the court, is whether the attorney erred. For example, only a judge can determine whether an affidavit required for an appeal was defective or if the appeal would have been successful....
>
> Since the determination of whether an attorney erred raises a question of law, the

> opinions of expert witnesses on the issues are irrelevant. (Footnotes omitted). R. Mallen & V. Levit sect. 659, at 820-21.

Id., 46 Wash. App. at 713, 735 P.2d at 678-679. Defendants urge that this "two-part" test is appropriately applied here. Deft. Br. at 31-32.

While Plaintiffs do not dispute whether Halverson was correctly resolved on the merits, this "two-part" test is facially inconsistent with a long-line of decisions by the Supreme Court. It is the settled law of this State that the case for professional negligence against an attorney is no different that an ordinary negligence case, once the attorney client relationship is established. E.g., Stangland v. Brock, 109 Wash.2d 675, 747 P.2d 464 (1987); Bowman v. John Doe Two, 104 Wash.2d 181,

704 P.2d 140 (1985); Ward v. Arnold, 52 Wash.2d 581, 328 P.2d 164 (1958).

In a medical malpractice case, the court does not engage in an initial inquiry regarding whether or not the doctor erred. Its inquiry is confined to whether Plaintiff has come forward with an affidavit that states that the physician failed to comply with the standard of care of a reasonably prudent physician acting under the same or similar circumstances in the State of Washington. Harris v. Groth, 99 Wash. 2d 438, 663 P.2d 113 (1983); Swanson v. Brigham, 18 Wash. App. 647, 571 P.2d 212 (1977).

The Mallen & Levit analysis draws a distinction between the legal malpractice case and the medical malpractice case, stating, "since the determination of

whether an attorney erred raises a question of law, the opinion of expert witnesses on the issues are irrelevant." Halvorsen v. Ferguson, supra. Thus, the Mallen & Levitt rationale places victims of legal malpractice in a separate class whose members are treated differently from victims of other forms of professional malpractice, with no legitimate state interest to support the discrimination. Furthermore, by injecting the trial judge into the fact-finding process (does the judge think the attorney erred?), the victim of legal malpractice is deprived of his/her right to trial by jury.[6]

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[6] Basically, according to the Mallen & Levitt analysis, only if the judge agrees as a matter of law that the attorney was negligent is the plaintiff allowed to have his/her claim heard by a jury; ironically, under such an approach, when the plaintiff gets the jury, he/she

The dissenting opinion in Stangland v. Brock, supra, also is illuminating of how the "two-part" inquiry infringes upon the province of the jury. There Justice Goodloe opined,

> Yet without denying the existence of a duty here, the majority goes on to dispose of this case by holding that the respondent attorneys were not negligent as a matter of law because their conduct satisfied the applicable standard of care. [citation omitted]. In so holding, the majority usurps the jury's function. Once we determine that an attorney owed a duty to a particular plaintiff, it should be left to the jury to decide whether the standard of care was violated.

109 Wash.2d at 687, 747 P.2d at 464.

. . .

Here, not only did Plaintiffs introduce affidavits by two experts

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presumably would be entitled to a directed verdict on the issue of breach of duty and only damages would be left to be resolved by the jurors!

stating that there has been a failure to adhere to the pertinent standard of care, but also Defendants introduced no testimonial support for their position that Mr. Barnett's conduct comported with the standard of care. In other words, as a practical matter in finding support on the record for the trial judge's decision, this Court must either find that the trial judge is an expert witness or that Defendants' counsel is an expert witness. With all due respect to the capabilities of each, neither scenario is appropriate. E.g., R.P.C. Rule 3.7.

The Supreme Court has carved out but one exception to the rule that the issue of causation must be submitted to the jury. That exception is where the alleged negligence is the failure to timely file an appeal. Daugert v.

Pappas, 104 Wash.2d 254, 704 P.2d 600 (1985). Since in a negligence case, plaintiff must be able to demonstrate causation in fact, in the case where an attorney has failed to timely file an appeal, the plaintiff must show that the appellate court would have granted review and rendered a judgment more favorable to the client. Id. Accordingly, the Daugert court held that whether the appellate court would have granted review and whether it would have rendered a judgment more favorable to plaintiff are questions are uniquely suited to determination by a judge, and in that limited circumstance, cause in fact is a question of law. Daugert v. Pappas, supra, 104 Wash.2d at 258, 704 P.2d at 603-604.

Key to the Court's decision in

Daugert is the fact that the plaintiff will actually secure review by the appellate court of the trial court's determination in the underlying case:

> The client in a legal malpractice case can eventually have the case reviewed. For example in the instant case, the client's underlying claim was not reviewed by the court initially because of the attorney's negligence. However, in the subsequent malpractice action the trial judge should have decided whether the Supreme Court would have accepted review and held in favor of the client. If the trial judge found review would have been denied, the client could have sought review in the Court of Appeals and ultimately in the Supreme Court. Hence, the client would eventually regain the opportunity to have the claim reviewed by the Supreme Court.

Daugert v. Pappas, 104 Wash.2d at 258, 704 P.2d at 605. Thus, while the decision in Daugert arguably interferes with the right to trial by jury, there is

no harm done to the plaintiff since the plaintiff is effectively being restored to the status quo ante. Unlike the plaintiff in Daugert, here the Plaintiffs have not even had their day in court! Here the issue is not whether an appeal was timely taken, the issue is whether Plaintiffs have introduced evidence to show that there is testimony to support their claims.

. . .

PETITION FOR REVIEW pp. 11-13 stated:

. . .

A close review of the Appeals Court's analysis discloses the only possible explanation for its conclusion that there is no showing of causation: that the judges are substituting their opinions for the opinions of Plaintiffs' experts. This is contrary to law. See Zamora v. Mobil Oil, 104 Wash.2d 199, 704 P.2d 584 (1985); Sacred Heart Medical Center v. Carrado, 92 Wash.2d 631, 600 P.2d 1015 (1979).

By finding that, despite the contrary opinions of Plaintiffs' experts, there has been no causation, the appellate panel usurps the role of the jury. The state and federal constitutions protect the right to trial

by jury.[6] That right has been denied here where the Wilsons' and Luttons' meritorious claim has been dismissed on a summary judgment motion! Indeed, both the trial court and Court of Appeals seem to be confused about the purpose of the summary judgment exercise: it is not to prove the party's case beyond a preponderance of the evidence, but rather is to demonstrate that Plaintiffs will be able to come forward with evidence at trial on which a jury may ultimately base its decision. E.g., Almy v. Kvamme, 63 Wash.2d 326, 387 P.2d 372 (1963).

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[6] WASH. CONST. art. 1, sect. 21. While U.S. CONST. amend. VII does not directly apply to state court civil actions (Walker v. Sauvinet, 92 U.S. 90 (1875), the federal constitution's due process protection (U.S. CONST. amend. XIV, sect. 1) requires the state to observe its own constitutional protection and "the settled course of judicial proceedings". Walker v. Sauvinet, supra, at 93.

Plaintiffs experts' affidavits state unequivocally and with specificity that in their opinions the observed deficiencies in Mr. Barnett's conduct in fact caused the Plaintiffs' injuries. No more than this is required. E.g., Bowman v. John Doe Two, supra; Ward v. Arnold, supra.

This case also involves another significant question of law under both the Washington and United States' constitutions: the role of the judge in the legal malpractice case. Essentially, if the role of the judge in a legal malpractice case decides, on his own, questions such as "did the attorney err?", "was the attorney negligent", and "did the attorney's conduct cause the injury", then plaintiffs in a legal malpractice case are treated differently

from plaintiffs in other types of professional negligence suits.

In a medical malpractice case, all that is required is that the plaintiff come forward with an affidavit of an expert stating that there has been a failure to adhere to the standard of care, which failure caused the injury. See generally, Douglas v. Bussabarger, 73 Wash.2d 476, 438 P.2d 829 (1968); Hayes v. Hulswit, 73 Wash.2d 796, 400 P.2d 849 (1968); Schoening v. Grays Harbor Hospital, 40 Wn. App. 331, 698 .2d 593 (1985); Snoberg v. Kelly, 1 Wn. App. 673, 463 P.2d 280 (1969). Plaintiffs have done precisely that here, yet the judges have ignored the expert substituted their opinions for those of the experts. This amounts to a discrimination which violates the equal protection guarantees

of the state and federal constitutions. WASH. CONST. art 1, sect. 12; U.S. CONST. amend XIV, sect. 1. In other words, there are two classes of plaintiffs--those victims of a lawyer's negligence and those victims of other professional negligence. In the former case the court is permitted to substitute its opinion for that of the expert; in the latter it is not. No legitimate state interest support the differential treatment and the constitutional guarantees of equality in treatment are violated.

. . .

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

ROBERT WILSON and NORMA WILSON, husband and wife; CLARENCE LUTTON and JUDITH LUTTON, husband and wife; and WLR CONSTRUCTION, INC., a Washington corporation,	NO. 87-2-04812-3
Plaintiffs,	AFFIDAVIT OF ROBERT B. GOULD
vs.	
KARR, TUTTLE, KOCH, CAMPBELL, MAWER, MORROW & SAX, P.S., a Professional Service Corporation; and DEVITT D. BARNETT and JANE DOE BARNETT, husband and wife, and the marital community composed thereof,	
Defendants.	

STATE OF WASHINGTON)
) ss.
COUNTY OF PIERCE)

I, ROBERT B. GOULD, being first duly sworn, do depose and state:

1. I am an attorney who has been retained by Smith, Alling, Hudson & O'Connor, P.S., as an expert witness in the above-captioned case. I have personal knowledge of the facts herein stated.

2. I have been engaged in the practice of law continuously since my admission to practice in Idaho in 1968 and Washington in 1969. I have represented plaintiffs in legal malpractice cases since at least 1973. For the past four to five years, plaintiffs' legal malpractice has comprised the majority of my practice, and my best estimate is that 60 to 75 percent of my practice at any one time is devoted to plaintiff legal malpractice

and other professional negligence work. I have been engaged as an expert witness in connection with four other cases, one of which was Short & Cressman v. Demopolis, 103 Wash.2d 52, (1984).

3. I have reviewed various materials forwarded to me by counsel for the Plaintiffs in the above-captioned litigation. I also have reviewed the materials filed by counsel for the Defendants in connection with their Motion for Summary Judgment or to Amend, Motion to Disqualify, and Motion to Compel.

4. For the purposes of this Affidavit, I have assumed the following facts to be true:

a. Mr. Barnet had an attorney/client relationship with Mr. & Mrs. Robert Wilson prior to the formation

of WLR Construction. Mr. Barnett was the attorney for Mr. Wilson's company, A&B Cat Service, Inc.

b. Mr. Barnett was the attorney for WLR Construction, Inc., formed WLR Construction, Inc., and was the author and draftsperson of the Buy-Sell Agreement between the three individual stockholders, Retherford, Wilson and Lutton.

c. Mr. Barnett was consulted about and authored the repossession of the two scrapers by A&B Cat Service, Inc.,;

d. Mr. Barnett was the progenitor of the assignment by WLR Construction, Inc., of the two scrapers leased from Westland Leasing Corp. to Wilson and Lutton;

e. Neither the leasehold

interest in the A&B Cat Service scrapers nor the leasehold interest in the Westland scrapers was offered for sale to Retherford or to an outside party as an arms length transaction.

5. Based upon the materials presented to me and the foregoing facts, in my opinion, Mr Barnett did not meet the minimum standard of care of a reasonable attorney in the same or similar circumstances in the State of Washington in his representation of the Plaintiffs in this case in <u>at least</u> the following respects:

a. Advising them not to follow the shareholder agreement and/or not advising his clients of the risk of not following the shareholder agreement when it came to the purchase of Mr. Retherford's interest in WLR

Construction, Inc.

b. Representing both A&B Cat Service, Inc., and WLR Construction, Inc., when the former repossessed the two scrapers leased by the latter;

c. Representing both the Wilsons and Luttons in the assignment to them of the two Westland scrapers leased by WLR Construction, Inc. For example, there does not appear to have been any consideration that the corporation received for the assignment to Wilson and Lutton; Mr. Barnett did not even notify Mr. Mayhew or his client, Mr. Retherford, of the assignment; Mr. Barnett did not advise his clients to go out and see if the corporation could benefit by the "sale" of the leasehold interest to third parties. These matters constitute a favoring of the interests of his clients,

Wilson and Lutton, to the detriment of his client, WLR Construction, Inc. It is matters such as these which gave great impetus and weight to the lawsuit instituted by Mr. Mayhew.

6. The Shareholder Agreement among Wilson, Lutton and Retherford states at paragraph 5 that the purchase price of the corporate shares would be "net book value...at the close of the fiscal quarter next preceding the date of transfer." The August 2, 1984 letter from Mr. Barnett to Mr. Retherford accepting his resignation as an officer and director on behalf of the corporation, attached hereto as Exhibit RBG-1, (Note: For purposes of this Petition, Exhibits referred to herein are not reproduced), reflects that Mr. Retherford was informed that the transfer

of shares would occur in accordance with the Shareholder Agreement; the August 16, 1984 letter from Mr. Barnett to Mr. Retherford's attorney indicates that a transfer on or about September 15, 1988 was contemplated. The corporation's fiscal year has a March 31 year end; therefore, the "end of the quarter next preceding the transfer" would necessarily be August 31.

7. I have reviewed the Amended Complaint filed by Mr. Retherford against WLR Construction, Inc. This Complaint, among other things, prays for an accounting by Wilson and Lutton as follows: "their conduct in the management of WLR Construction, Inc., and the disposition of funds and property of WLR Construction, Inc., and be compelled to account for and repay to WLR

Construction, Inc. all money lost, wasted, or improperly diverted as a result of their violation of their obligations as officers and directors of WLR Construction, Inc." In my opinion, the Wilsons and Luttons had considerable financial exposure to Mr. Retherford because, among other things, they had appropriated at least two corporate opportunities to their personal benefit and used the assets gained in the preferential transfers for their personal profit for a lengthy period of time; for example, the corporation was deprived of its right to use for its profit two of the pieces of equipment from March 1985 through January 1987.

8. It is my understanding that the issue of whether there was continued viability to the Shareholder Agreement,

notwithstanding the adoption of a plan of dissolution, and the issue of whether the dissolution was conditioned upon anything were tried before the Honorable E. Albert Morrison on May 21, 1986. I have reviewed an excerpt of the transcript of that trial. In my opinion, it does not fall below the standard of care of a reasonably prudent attorney in the State of Washington acting under the same or similar circumstances to not have taken an appeal of Judge Morrison's ruling. It is also of note that Judge Morrison expressed the opinion at page 6 of the excerpts attached to Ms. MacKinnon's Affidavit that both attorneys were excellent.

9. In the more than fifteen years in which I have prosecuted legal malpractice cases, I am unaware from my

research of any instance in which an appellate court in the United States has found a common law right of contribution in favor of the attorney committing malpractice against the successor attorney where the two attorneys did not cause the same injury. This is because a right of contribution depends upon joint and several liability, and it is only in very rare circumstances that the succeeding attorney could have committed negligent acts which later in time cause the identical injury as was earlier caused by the first attorney. E.g., R. Mallen & V. Levit, Legal Malpractice, (2nd Ed. 1981) at sect. 82; Nassau Roofing & Sheet Metal Co. v. Facilities Development Corp., 71 N.Y.2d 599, 528 N.Y.S.2d 516 (Ct. App. 1988); Jodelis v. Harris, 138 Ill.App.3d 457, 92 Ill. Dec.

965, 485 N.E.2d 1208, 1210 (1985).

10. From my review of the salient material, a trier of fact could find that Mr. Barnett's conduct caused damage to the Plaintiffs. For example, a jury could find that following the Shareholder's Agreement would have resulted in an enforceable legal obligation by WLR Construction, Inc. to Retherford in an amount apparently equal to roughly $20,000, plus repayment of loans, less debts due from Retherford to the corporation. Similarly, a jury could find that several of the acts of negligence committed by Mr. Barnett exposed the Wilsons and Luttons to weighty damage claims by Mr. Retherford. The acts of negligence referred to in the preceding sentence are, failing to draft documents which were legally effective to

accomplish the intent of the parties (to wit a dissolution plan which was conditional), failing to take proper steps to rescind the dissolution plan, and affirmatively advising the officers and directors to take steps amounting to a misappropriation of corporate opportunities; each of these are examples of conduct by Mr. Barnett which falls below the standard of care of a reasonably prudent attorney practicing law in the State of Washington.

11. In my professional opinion, a jury could not find that there is an intervening cause between the negligence of Mr. Barnett and the damage to the Plaintiffs because the damage caused by Mr. Barnett (such as the exposure to liability to Retherford) occurred prior to Ms. MacKinnon's involvement in the

case. So too, I am aware of no authority which would permit an attorney liable for malpractice to contend that his clients were contributorily negligent because they followed his advice.

12. Ms. MacKinnon, in my opinion, is not a necessary witness for the presentation of Plaintiff's case. Even if the evidence regarding the course of settlement negotiations was admissible in this case, which in my opinion it is not because Mr. Barnett never recommended settling for an amount greater than $20,000 (see Exhibit RBG-2) and because Karr Tuttle refused the tender of the defense of Retherford's suit by Plaintiffs and refused to express an opinion on whether Plaintiffs should accept Retherford's settlement offer (see Exhibit RBG-3), and testimony about

offers which were made can be elicited by Defendants from Mr. Mayhew, Mr. Retherford, the Wilsons and the Luttons; therefore, Ms. MacKinnon is not a necessary witness. Additionally, even if she were called by the Defendants, she could not testify about her recommendations to the Wilsons and Luttons because these matters are governed by the attorney-client privilege. From the information made available to me, it is my understanding that Ms. MacKinnon's clients have not waived the attorney-client privilege; therefore, no testimony could be elicited from her.

13. It is my further professional opinion based upon over 20 years as an attorney, that if the Defendants' motion to disqualify is granted, such a tactic

will result in greatly increased legal fees to the already injured Plaintiffs.

Further deponent saith not.

DATED this 31 day of October, 1988.

/s/
ROBERT B. GOULD

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

SUBSCRIBED AND SWORN to before me this 31st day of October, 1988.

/s/

NOTARY PUBLIC, in and for the State of Washington, residing at _____

My commission expires_____

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

ROBERT WILSON and NORMA WILSON, husband and wife; CLARENCE LUTTON and JUDITH LUTTON, husband and wife; and WLR CONSTRUCTION, INC., a Washington corporation,	
Plaintiffs,	AFFIDAVIT OF ROBERT B. GOULD
vs.	
KARR, TUTTLE, KOCH, CAMPBELL, MAWER, MORROW & SAX, P.S., a Professional Service Corporation; and DEVITT D. BARNETT and JANE DOE BARNETT, husband and wife, and the marital community composed thereof,	NO. 87-2-04812-3
Defendants.	

STATE OF WASHINGTON)
) ss.
COUNTY OF PIERCE)

I, ROBERT B. GOULD, being first duly sworn, upon oath, depose and state:

1. In my affidavit of October 31, 1988, I stated in paragraphs 10 and 11 that ". . . a trier of fact could find . . ." and ". . . a jury could not find . . ."

2. Attached hereto are pages 6-C-5, 6-C-6 and 6-C-7, authored by affiant, for a Washington State Bar Association CLE given on Friday, April 12, 1985, entitled, "Screening, Preparation and Trial of a Legal Malpractice Case." For the reasons given in these three pages, it is the view of affiant that it is improper for a lawyer/expert witness to testify as an expert witness in a legal malpractice case with regard to the questions of proximate cause. For that reason, I advised plaintiffs' counsel that I thought it ethically better to word paragraphs 10 and 11 of my October 31, 1988 affidavit in the manner that I did.

3. It is my personal opinion that there is no question that Mr. Barnett's conduct delineated in my affidavit of October 31, 1988 did cause the plaintiffs' damage of which they are complaining in their complaint. However, having said that, it is my further professional opinion that that is not the proper province of expert testimony in a legal malpractice case.

/s/

Robert B. Gould

SUBSCRIBED AND SWORN to before me this 13th day of April, 1989.

/s/

NOTARY PUBLIC in and for the State of Washington, residing in Seattle.
My Commission expires _____

Pages 6-C-5, 6-C-6 and 6-C-7 stated:

. . .

C. SCOPE OF EXPERT TESTIMONY

Expert testimony is to help the trier of fact due to the expert's "specialized knowledge". ER 702. In the case of legal malpractice, that specialized knowledge is directed to the standard of care.

Trial courts have wide latitude in exercising their discretion to admit or exclude the testimony of expert witnesses. See Harris v. Robert C. Groth, M.D., Inc., P.S., 99 Wn.2d 438, 63 P.2d 113 (1983). However, that discretion is not unlimited. See Ewer v. Johnson, 44 Wn.2d 746, 270 P.2d 813 (1954), "An expert may not go so far as to usurp the exclusive function of the jury to weigh the evidence and determine

credibility." 5A-K. Tegland, Wash. Prac., Evidence, § 292, at 39N.4 (2d. Ed. 1982).

It is the experience of this author that frequently defense counsel attempt and/or succeed in having the lawyer/expert witness testify beyond what the standard of care may or may not be and "wander" into the area of proximate cause, frequently testifying as a defense expert that there was no proximate cause between the alleged malpractice and of the harm complained.

Legal malpractice in this sense differs not one iota from other negligence cases. "The principles and proof of causation in a legal malpractice action do not differ from an ordinary negligence case." Sherry v. Diercks, 29 Wn.App. 433, 437, 628 P.2d 1336 (1981),

"We see no sound reason, and non is urged, why the degree of causation which must be proved in an action for damages for malpractice should be any different from that required in an ordinary negligence case." Ward v. Arnold, 52 Wn.2d 581, 584, 328 P.2d 164 (1958).

In a long line of cases, the appellate courts of the state of Washington have held that proximate cause is a factual question to be resolved by the jury and proximate cause is established as a matter of law only in the ". . . clearest of cases and when reasonable minds could not have differed in their interpretation of a factual pattern." Baughn v. Malone, 33 Wn.App. 592, 598, 656 P.2d 1118 (1983), Everett v. Diamond, 30 Wn.App. 787, 791, 638 P.2d 605 (1981), Boeing v. State, 89 Wn.2d

443, 449-450, 572 P.2d 8 (1978).

Accordingly, alert plaintiffs' counsel should object to lawyer/expert witnesses' wandering from their expertise as to the standard of care into the factual determination of proximate cause which is to be made by the trier of fact.

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

ROBERT WILSON and NORMA WILSON, husband and wife; CLARENCE LUTTON and JUDITH LUTTON, husband and wife; and WLR CONSTRUCTION, INC., a Washington corporation, Plaintiffs, vs. KARR, TUTTLE, KOCH, CAMPBELL, MAWER, MORROW & SAX, P.S., a Professional Service Corporation; and DEVITT D. BARNETT and JANE DOE BARNETT, husband and wife, and the marital community composed thereof, Defendants.	NO. 87-2-04812-3 AFFIDAVIT OF DOUGLAS M. BRANSON

STATE OF WASHINGTON)
) ss.
COUNTY OF PIERCE)

I, DOUGLAS M. BRANSON, being first duly sworn, upon oath, depose and state:

1. I am an attorney who has been retained by Smith, Alling, Hudson & O'Connor, P.S. as an expert witness in the above-captioned case. I have personal knowledge of the facts herein stated.

2. I was graduated from the Northwestern University School of Law with a Juris Doctor degree cum laude in 1970. Thereafter, I earned a Master of Laws degree from the University of Virginia Law School in 1974; I was first in my class. My 1965 B.A. degree in Economics from University of Notre Dame also was conferred with honors.

3. I am presently employed as a Professor of Law at the University of Puget Sound, a position I have held since

1974. I teach in the fields of, among others, corporations, securities, business planning and torts, including malpractice. Additionally, I have taught as a visiting Professor of Law at the following institutions: University of Oregon, Cornell University, University of East Anglia at Norwich, England, and Arizona State University. I also engaged in the private practice of law in the fields of general corporate, securities and litigation for three years following my graduation from law school.

4. I have reviewed various materials forwarded to me by counsel for the Plaintiffs in the above-captioned litigation. I also have reviewed the materials filed by counsel for the Defendants in connection with their Motion for Summary Judgement or to Amend,

Motion to Disqualify, and Motion to Compel.

5. It is my opinion that Mr. Barnett committed malpractice in one or more respects. In advising the Wilsons and Luttons, he seems persistently to have failed to recognize who his client was, that is, the corporation, including all of its shareholders. He seems to have advised the Wilsons and Luttons that, as the two remaining directors who controlled two-thirds of the shares, they could do as they wished with corporate assets and opportunities.

6. Mr. Barnett also seems to have failed to note any distinction between redemption of Mr. Retherford's shares and liquidation and dissolution of the company. Despite a 1985 vote of all three shareholders to dissolve the

company, Mr. Barnett apparently advised Mr. Wilson and Mr. Lutton that they could carry on the corporation's business during January, February, and March. Moreover, he advised them that they could cause the corporation to reverse course and again attempt to redeem Mr. Retherford's shares, despite the adoption of a definitive statement of intent to dissolve.

7. The Washington General Business Corporation Act chapter on dissolution is explicit. The statute provides that upon filing a statement of intent to dissolve, "the corporation shall cease to carry on its business, except insofar as may be necessary for the winding up thereof...." RCW 23A.08.050. Moreover,

> "[t]he corporation shall proceed to collect its assets, convey and dispose of such of its properties as not to be

> distributed in kind to its shareholders, pay, and do all other acts required to liquidate its business and affairs, and, after paying or adequately providing for the payment of all its obligations, distribute the remainder of its assets, either in cash or in kind, among its shareholders according to their respective rights and interests."

RCW 23A.28.060. Apparently instead of reading and following the dissolution statute, on March 28, 1985, Mr. Barnett attempted to return to a $3,100.00 offer to redeem, even reduced by $625.00 for interest on a state sales tax deficiency for which shareholder Retherford was deemed to be responsible.

8. In my opinion, the reasonable attorney in the area and community, with the benefit of no special expertise, but with the knowledge of an average reasonable practitioner, in the exercise of reasonable care, would have done the

following:

(a) Recognized that his or her client is the corporation and not any particular person or persons within it and advised accordingly;

(b) Recognized the shift from redemption to liquidation was significant and as precluding a shift back to whatever redemption rights remained, absent at least further shareholder action: see e.g. RCW 23A.28.060.

(c) Would have read the dissolution statutes and advised the corporation and its board accordingly;

(d) Would have recognized that as counsel to the corporation he could not ethically draft documents transferring possession of and title to corporate leasehold assets to two of the corporation's shareholders, at the

expense of the minority shareholder.

9. A jury could reasonably conclude that Mr. Barnett's failure to adhere to the appropriate standard of care directly caused injury to the Plaintiffs because they incurred legal and accounting expenses far greater than would have been the case if the Shareholder Agreement had been adhered to in the first place, or if the Dissolution had been completed, or if the Dissolution had been properly rescinded and the Shareholder Agreement reverted to. Also, a jury could reasonably conclude that the deficiencies in Mr. Barnett's representation are the direct cause of injury to Plaintiffs because their failure to dissolve the corporation and their use of its assets for their personal gain prejudiced the corporation, and therefore harmed its

minority shareholder. If Mr. Barnett had recognized who his client was, to wit, the corporation, none of the events would have occurred. Instead, the errors compounded themselves at every turn.

10. It is my understanding that the issue of whether there was continued viability to the Shareholder Agreement, notwithstanding the adoption of a plan of dissolution, and the issue of whether the dissolution was conditioned upon anything were tried before the Honorable E. Albert Morrison on May 21, 1986. I have reviewed an excerpt of the transcript of that trial. In my opinion, it would not have been cost effective to appeal the ruling.

Further deponent saith not.

/s/

Douglas M. Branson

SUBSCRIBED AND SWORN to before me this 31 day of October, 1988.

/s/

Notary Public in and for the State of Washington, residing at _____.

My Commission expires:_____

SUPERIOR COURT OF WASHINGTON
FOR PIERCE COUNTY

ROBERT WILSON and NORMA WILSON, husband and wife; CLARENCE LUTTON and JUDITH LUTTON, husband and wife; and WLR CONSTRUCTION, INC., a Washington corporation, Plaintiffs, vs. KARR, TUTTLE, KOCH, CAMPBELL, MAWER, MORROW & SAX, P.S., a Professional Service Corporation; and DEVITT D. BARNETT and JANE DOE BARNETT, husband and wife, and the marital community composed thereof, Defendants.	NO. 87-2-04812-3 SUPPLEMENTAL AFFIDAVIT OF DOUGLAS M. BRANSON

STATE OF WASHINGTON)
) ss.
COUNTY OF PIERCE)

I, DOUGLAS M. BRANSON, being first duly sworn, upon oath, depose and state:

1. I make this Affidavit in supplement to my affidavit dated October 31, 1988. This Affidavit is submitted in support of Plaintiffs' Motion for Reconsideration.

2. The opinions expressed in my previous affidavit were based upon, inter alia, the following facts:

a. During at least July 1984 through March, 1986, Mr. Barnett had an attorney client relationship with WLR Construction, Inc. During this time he also undertook to advise Wilson and Mr. Lutton regarding their interests which were directly adverse to the corporation.

b. Mr. Barnett, on various occasions, advised Mr. and Mrs. Wilson and Mr. Lutton that they could do as they

pleased with corporate assets and opportunities.

c. Mr. Barnett, after being unable to realign the debt on the equipment, advised the majority shareholders that they could satisfy their obligations under the Washington Business Corporation Act by placing $3,104 in a redemption account for Philip Retherford, and distributing the Westland equipment to themselves.

d. Mr. Barnett assisted Mr. Wilson's corporation (A & B Cat Service) in effecting a forfeiture of two-fifths of the corporate assets which were leased on a lease purchase agreement to WLR Construction, Inc., which lease was in the thirteenth month of an eighteen month term, with a $5,025 residual buy-out price (and monthly payments of

$2,710.38).

As expressed in my previous affidavit, based upon these facts, it is my opinion that Mr. Barnett's conduct fell well below the standard of care of a reasonably prudent attorney acting in the same or similar circumstances in the State of Washington.

3. In my previous affidavit, at paragraph 9, I phrased my opinion with regard to causation in the fashion which I did because my professional opinion is that causation in a legal malpractice case is a question of fact to be resolved by the jury. To the extent that the Court, by its ruling on April 10, 1989, believes that expert testimony on causation in this matter is appropriate, my opinion is that Mr. Barnett's failure to adhere to the applicable standard of

care was the direct and proximate cause of the injuries of which the Plaintiffs' complain in their Complaint. In my personal opinion, Plaintiffs incurred legal and accounting expenses far greater than would have been the case if the Shareholder's Agreement had been adhered to in the first place, or if the Dissolution had been completed, or if the Dissolution had been properly rescinded. Furthermore, my personal opinion is that the Plaintiffs' failure to dissolve the corporation and their use of its assets for personal gain harmed the minority shareholder and gave great weight and impetus to the suit brought by Mr. Retherford against the Corporation and the directors. Assuming to be true the Plaintiff's testimony that they acted pursuant to Mr. Barnett's recommendations

and advice, then, in my opinion, but for Mr. Barnett's negligence, Plaintiffs' exposure to Mr. Retherford would have been much less. This is why in my deposition I stated that Judge Morrison's ruling in May 1986 only dealt with one part of the case, and did not deal with Mr. Retherford's prayer for an accounting of the use of the assets of the corporation by the directors subsequent to the vote to dissolve. See Retherford v. Wilson, et al, Superior Court Cause No. 85-2-01759-1, Amended Complaint.

4. In sum, it is my expert opinion that there is malpractice in one or more instances committed by Mr. Barnett. Further, my personal opinion is that both causation and injury exist as Plaintiffs allege.

Further deponent sayeth not.

DATED this 20th day of April, 1989.

/s/
DOUGLAS M. BRANSON

SUBSCRIBED AND SWORN to before me this 20th day of April, 1989.

/s/
NOTARY PUBLIC in and for the State of Washington, residing at _____
My appt. expires _____